**Remarks of Congressman Tom Feeney**
**On the hearing on the Courts and International Law**
**Subcommittee on the Constitution, March 25, 2004**
**Markup of H.Res. 568, May 13, 2004**

**Increasingly Federal Judges, including 6 U.S. Supreme Court Justices, have expressed disappointment in the Constitution we inherited from the framers, and disdain for certain laws enacted by democratically elected Representatives. With disturbing frequency, they have simply imported law from foreign jurisdictions, looking for more agreeable laws or judgments in the approximately 191 recognized countries in the world. They champion this practice and fancy themselves players on the international scene of jurisprudential thought. In their recent speeches, several Justices have referred to the "globalization of human rights" and assuming a "comparative analysis" when interpreting our constitution. Is this a proper role for our United States judges?**

**Mr. Goodlatte, Mr. Ryun, and I hope to have a great civics debate on the Constitutionally Appropriate role of judges in our Republic. This is why we asked Chairman Chabot to conduct hearings on this subject.**

**The Framers of the U.S. Constitution certainly understood that America had to take its place in the International community. They provided a blueprint for how our government should build**

**relations with other nations. In Article VI, they provided that treaties made pursuant to the U.S. Constitution would be the "Supreme law of the land." Congress was given the power to remedy "offenses against the law of nations" in Article 1, Section 8. In Article II, they gave the President the power to make treaties with the advice and consent of the Senate. Furthermore, the Founders created our Legislative process as the people's body. If our constituents believe that the laws of another nation are superior to our own or inform us as to a better approach to an issue, they have the right to bring that idea to the attention of their respective representative and let the idea go through the legislative process.**

**The Framers, in our brilliant Constitution, established a fine balance to protect American Constitutional Democracy. They carefully separated the legislative branch's role from the judicial one, making clear that while judges interpret the law and apply it to individual cases and controversies; only the legislature is empowered to "create law." For example, in explaining the Constitution to the American people in Federalist 47, Madison approvingly quotes Montesquieu: "Were the powers of judging joined with the Legislative, the Life and Liberty of the Subject would be exposed to the Arbitrary Control, for the Judge would then be the Legislator."**

**In the Declaration, Jefferson and the Founders explained the rational for war against the King in part by saying, "He has**

**combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws." And yet, increasingly American judges at the highest levels of the federal judiciary cannot resist rationalizing otherwise baseless interpretation of American law by reference and incorporation of international law.**

**Justice Ginsburg recently quoted the phrase from the Declaration that says, "A decent respect to the opinions of mankind requires that they should declare the causes which impel them to the Separation" as justification for the Court's broadening of their judicial horizons to include comparative law in their opinions. However, this statement unbelievably misses the point our Founders were making when deciding to separate from the "Old World." The Declaration declares our independence from England. From our inception we chose to separate from other nations. This is a part of our heritage. We did this because we viewed the way other nations were governed and ruled and decided it was not the way America should be governed and ruled. People came to this country as the "New World," to leave the traditions and oppression of the "Old World." We are a nation unlike any other and our judges misunderstand our very foundation when they believe that we need to look to the "international consensus." Importing foreign laws directly contradicts the spirit of the Declaration of Independence.**

**In Federalist 78, Hamilton cited Montesquieu, "There is no liberty, if the power of judging be not separated from the Legislative and Executive powers."**

**Lincoln in his Inaugural speech, critiqued the Infamous Dred Scott Decision of the US Supreme Court when he said, "…The candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court…the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal…"**

**Article VI of the U.S. Constitution clearly provides in the Supremacy Clause, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; And all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land."**

**It is in this context that I am alarmed that 5 Justices in the Lawrence v. Texas case, imported recent foreign law to interpret our over 200 year old Constitution..**
**In a case focusing on allowable delays of execution (Knight vs. Florida) Supreme Court Justice Stephen Breyer said he found "useful" court decisions on the matter in India, Jamaica, and Zimbabwe.**

**Will he also find useful Zimbabwe law when interpreting the First Amendment? As Congressman Randy Forbes points out, "Last month Zimbabwe's highest court upheld a law requiring all journalists to be licensed by the government or face criminal charges. The law says that any journalist who works without a license from the state-appointed Media and Information Commission can be prosecuted, and may face up to two years in prison if found guilty. Dozens of journalists have been prosecuted under the Act, which has also been used to prevent publication of Zimbabwe's only major independent daily newspaper, *The Daily News*."**

**Justice Sandra Day O'Connor, while she did not join in the majority reasoning of Lawrence, said in a recent speech "I suspect that over time [the U.S. Supreme Court] will rely increasingly ... on international and foreign courts in examining domestic issues." According to the *Atlanta Journal-Constitution*, Justice O'Connor also stated that the U.S. judiciary should pay even more attention to international court decisions than it already does.**

**Justice Breyer declared that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights." He then concluded that nothing could be "more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us?" In conclusion he quoted**

**Wordsworth's poem on the French Revolution, hoping it will "still ring true," when Wordsworth wrote, "Bliss was it that dawn to be alive but to be young was very heaven." My recollection is that the French Revolution produced little "Liberte," but much bloodletting.**

**In a speech by Justice Ginsburg, August 2, 2003 to the American Constitution Society entitled "Looking beyond our borders: The Value of a Comparative Perspective in Constitutional Adjudication," she derided as outdated the Historical Jurisprudential view that reviewing the founding fathers references to foreign systems was useful in writing our Constitution, but contemporary foreign laws or constitutions is irrelevant to interpreting our own.**

**Justice Ginsburg approvingly cited cases where the U.S. Supreme Court Majority cited "the world community" to support its interpretation of the Constitution.**
**In acknowledging our great traditional jurisprudence she said that "hardly means we should rest content with our current jurisprudence and have little to learn from others…"**

**She had two suggestions. One, we need to have more "dynamism with which we interpret our Constitution." I ask, what does this mean? Apparently, Madison and the framers were insufficiently "dynamic" for Justice Ginsburg. Her second suggestion was that we need to have more "extraterritorial**

**application of fundamental rights." This sort of universal Jurisdictions have led Courts of other Countries to entertain criminal indictments as war crimes against President Bush I, Tony Blair, Colin Powell, and Wesley Clark, among others.**

**She concluded by bragging that our "island" or "lone ranger" mentality is beginning to change. She does not say what Constitutional amendment process, or what legislatively enacted law by elected Representatives permits this judicially imposed Constitutional transformation; Only that "Our Justices" are becoming more open to comparative and international law perspectives. Justice Breyer echoed the same position in a speech to the American Society of International Law when he said, "...[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the 'globalization' of human rights..."**

**Finally, I disagree with these Justices' newly created approach to interpreting American domestic law because if our Judges create law on Constitutional rights by use of foreign laws, they violate the Constitution many ways, including:**

- **Article I-placing lawmaking power solely in Congress**
- **Article II- Providing Presidential power to veto law**
- **Article II-Providing the President power to make treaties and the Senate the power to Advice and Consent**

- **Article IV-Guaranteeing all Americans a Republican form of Government (meaning they get to elect their lawmakers)**
- **Article V- Proper way to amend our constitution**
- **Article VI- The Supremacy Clause of the U.S. Constitution**

**Additionally, the people lose the ability to control the laws we are governed by when we cast our vote for their elected representatives, who make laws. They have NO vote when laws are made by judges who judicially import law.**

**As Professor Jeremy Rabkin stated in his book, "Sovereignty Matters," Constitutionalism is about legal boundaries. Because the United States is fully sovereign, it can determine for itself what its Constitution will require. And the Constitution necessarily requires that sovereignty be safeguarded so that the Constitution itself can be secure." Judges take an oath to protect and defend the Constitution, not to protect and defend international law or the laws of Canada or India. They have a duty to ensure our nation's sovereignty is protected.**

**As the great statesman Daniel Webster famously said, "Hold on, my friends, to the Constitution and to the Republic for which it stands. Miracles do not cluster and what has happened once in 6,000 years, may not happen again. Hold on to the Constitution, for if the American Constitution should fail, there will be anarchy throughout the world."**